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Supreme Court, U. S.
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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

CAPTAIN JERRY D. CONAWAY,

Plaintiff/Appellant,

vs.

CLIFFORD L. ALEXANDER, Secretary of the Army; JAMES C. SMITH, Major General, Commander, Fort Rucker, Alabama; LTC. NEAL R. CHRISTENSEN; COL. CARL H. McNAIR; LTC. JOHN A. PHILLIPS, JR.; COL. CRAWFORD BUCHANAN; LTC. DAN M. JANUTOLO,

Defendants/Appellees.

CIVIL ACTION NO.: _____

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
CIVIL ACTION NO.: 77-3100

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

This petition is based on the opinion of Judge Frank M. Johnson, Jr., Judge for the United States District Court for the Middle District of Alabama, delivered August 1, 1977. There is no official report of the opinion. The opinion is a part of the record at pp. 1307 through 1315 of the record on appeal to the Fifth Circuit Court of Appeals. This petition for writ of certiorari is a prayer for review of an opinion by the Fifth Circuit Court of Appeals affirming Judge Johnson's opinion. The Fifth Circuit's opinion is dated October 23, 1978.

STATEMENT OF GROUNDS OF JURISDICTION

On October 23, 1978, the United States Court of Appeals for the Fifth Circuit affirmed the denial of relief for

the plaintiff based on the opinion of Judge Frank M. Johnson, Jr., dated August 1, 1977.

This Court has jurisdiction to review the opinion of the Fifth Circuit Court of Appeals by writ of certiorari by virtue of Title 28, §1254 and Rule 19(b) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED FOR REVIEW

Can the United States Army deprive a serviceman of employment in his chosen profession, label him guilty of criminal, or quasi criminal activity, and deprive him of the benefit of Army regulations without affording him elementary due process under the Fifth Amendment to the Constitution of the United States?

Can the United States Army summarily "convict" a serviceman of adultery and theft through administrative channels

without affording the serviceman due process of law as required by the Fifth Amendment to the Constitution of the United States?

Does the career serviceman have a "liberty interest" to invoke due process claims where derogatory information and allegations of immoral or dishonest activity adversely affecting his community standing and future employability are placed in his permanent military file and become the basis for involuntary separation?

Is the expectation of continued employment in the United States Army by a career officer a protected property interest under the meaning of the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

5 Is due process of law under the Fifth Amendment to the Constitution of the United States afforded in matters of administrative discharge in the military where such discharge is attended by allegations of immorality and dishonesty?

Do civilian standards of due process as announced by this Court and others extend to servicemen who are administratively discharged under criminal or quasi criminal activity?

Is Army Regulation 635-100 Section V, 5-14(g)(3) unconstitutional?

8 Is the Army Board for Correction of Military Records authorized by law to approve the violation by the Army of its own regulations and thus validate a discharge which is otherwise accomplished in violation of the Army's own regulations?

Does the Army Board for Correction of Military Records have exclusive authority to interpret its own regulations to the exclusion of the Court's authority?

10 In the review of a decision of the Army Board for Correction of Military Records under the Administrative Procedure Act or other applicable law, does the plaintiff have the burden of proving that the decision being reviewed was arbitrary and capricious or should the decision of the Board be reversed if "erroneous in law" or violative of the individual's constitutional rights?

11 Can the Army's violation of its own regulations in administrative matters or involuntary separation procedures be justified by reasoning that the outcome would be the same even if the regulations had been followed?

PROVISIONS OF LAW INVOLVED

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

10 U.S.C. § 1552 (c) and (d) (1970):

> (c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for

> payment is made by a legal representative, the money shall be paid--
>
> (1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;
>
> (2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or
>
> (3) as otherwise prescribed by the law applicable to that kind of payment.
>
> A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.
>
> (d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

10 U.S.C. § 1553 (1970):

(a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal.

(b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

(c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veterans' Affairs under chapter 59 of title 38.

The Administrative Procedure Act, 5 U.S.C. §§ 702, 703, 704 and 706:

§ 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile

is inoperative, for an appeal to superior agency authority.

§ 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise

reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Army Regulation 635-100 Section V, 5-14(g)(3):

(g). The recommendations for elimination received from commanders and Headquarters, Department of the Army, agencies will be reviewed in Headquarters, Department of the Army. The following action may be taken:

. . .

(3) The recommendation may be referred to an appropriate selection board. The selection board will consider the recommendation for elimination and all supporting evidence, the overall record of the officer, and the officer's statement to determine whether he should be required to show cause for retention in the Army.

Army Regulation 623-105, 1-5(b):

(b). Reference will not be made to punitive or administrative action taken against an officer or to an investigation concerning an officer unless such action or investigation has been processed to completion, adjudicated, and final action taken within the rated period. Should the officer be absolved, comments pertaining to the incident will not be included in the report. The intent of this restriction is not to preclude or discourage the inclusion by rating officials of verified derogatory information on evaluation reports. It is intended only to preclude the permanent documentation in an officer's official military evluation file of charges or incidents of which he may later be absolved and which, if included, would be unjustly prejudicial to him. To insure that acts or incidents reflecting an officer's misconduct, professional, or character deficiencies, which occurred during the reporting period, but the investigation of which had not been concluded by the end of the reporting period, are recorded in his official records, the rater or the indorser, if the rater has been reassigned, will submit, upon completion of an investigation or imposition of punitive action, an addendum for attachment to the previously submitted evaluation report. The addendum will contain the rater officer's complete name, grade, SSN, and period of the evaluation report; details of the act or incident; and a summary of the findings of the investigation and action

taken by the appointing authority. If both the rater and indorser are reassigned prior to completion of an investigation involving the rated officer or the imposition on him of punitive action, the appointing authority or the commander imposing the punishment will inform the rater of the results so that he can comply with the above requirement. The addendum will be forwarded to the officer who reviewed the previously submitted evaluation report for his concurrence or further comment. Upon completion and authentication of his action, the reviewer will forward the original addendum to HQDA (para 3, app D for correct address) and a copy to the rated officer. The reviewer will indicate in his comments that a copy was forwarded to the rated officer and the address to which it was forwarded. If circumstances preclude the reviewer from referring the addendum to the rated officer directly, he may forward it to the rated officer through HQDA (see para 3, app D for correct address).

Army Regulation 635-100, 3-58:

General. Officers on active duty will be involuntarily relieved when their degree of efficiency and manner of performance or the needs of the service require such action.

(a). Officer records will be screened annually at Headquarters, Department of the Army, by the CG MILPERCEN; The Judge Advocate General; Chief of Chaplains; or The

Surgeon General, to determine those officers whose degree of efficiency and manner of performance require relief from active duty or elimination from the service. These records will be forwarded, without recommendation, to the Department of the Army Active Duty Board, or other designated board, for consideration within the prescribed guidance and criteria. Cases of officers designated by the board for release and elimination will be considered for processing under AR 135-175 or NGR 20-6, immediately following their release from active duty.

(b). When budgetary or authorization limitations require a reduction of officer strength, a Department of the Army Active Duty Board will be convened to determine which officers will be released from duty. Following prescribed criteria, the CG MILPERCEN; The Judge Advocate General; Chief of Chaplains; and The Surgeon General will forward officer records, without recommendation, for consideration by the board. Officers designated for release under this paragraph are not considered ineffective or substandard in duty performance. Their release is dictated by the needs of the service.

(c). The decision of these boards is final.

(d). Officers designated for release under this section may be relieved from active duty on any date between the date of notification and the 90th day after receipt of notification providing the release date is

mutually agreed upon by the individual and the commander specified in paragraph 3-60. The release date will not be later than the 90th day after receipt of notification by the officer concerned. The officer will not be released prior to the 90th day without his consent.

(1) An officer who initiates an evaluation report appeal under AR 623-105 or whose case is referred to the Department of the Army Active Duty Board by HQDA for reconsideration will continue to process for separation as scheduled. If final action on the appeal and/or the reconsideration by the Board has not been completed by the scheduled release date, the CG MILPERCEN will direct the temporary suspension of the officer's separation pending receipt of the outcome of the appeal/reconsideration. If, after the originally scheduled release date, the evaluation report appeal is denied or the officer is again designated for release, the release date will not be later than 30 days from the receipt of such notification by the officer concerned.

(2) The statement in figure 3-3 will be completed and signed by the officer concerned and placed in his Military Personnel Records Jacket (DA Form 201) as a permanent document.

(e). Officers who will complete 18 or more years of active Federal service on their scheduled release date will not be processed under this section, unless such action is approved

by the Secretary of the Army, but will be retained on active duty until the last day of the month following the month in which they complete 20 years of active Federal service.

(f). Release from active duty under this section is involuntary; therefore, release prior to the 90th day after notification will have no effect on entitlement to readjustment pay. See rule 1, table 4-4-8, DOD Military Pay and Allowances Entitlements Manual, concerning computation of readjustment pay.

STATEMENT OF THE CASE

The basis for federal jurisdiction invoked by the plaintiff, Jerry D. Conaway in the United States District Court of the Middle District of Alabama was the Administrative Procedure Act, 5 U.S.C. §§ 702, 703, 704 and 706, the Freedom of Information Act, 5 U.S.C. § 552, and the Fifth Amendment to the Constitution of the United States.

The appellant, Sgt. Jerry D. Conaway, joined the United States Army in June, 1958, at the rank of private. He served two

tours of duty in Viet Nam assigned to the First Battalion, Fifth Artillery, First Infantry Division, and later with the 164th Combat Aviation Group, First Aviation Brigade. He has been awarded the Bronze Star with V device, Bronze Star for meritorious service, the Air Medal, Army Commendation Medal with first oak leaf cluster, and the purple heart. He was commissioned a second lieutenant of artillery on July 6, 1965. In February, 1972, he was stationed at Fort Rucker, Alabama as a reserve officer (R. 2).

His service in the United States Army has been characterized by loyalty, professionalism and devotion to duty throughout his career as evidenced by voluminous letters of appreciation as well as excellent officer efficiency reports with the sole exception of the final such report which is part of the subject matter of this lawsuit.

On July 3, 1975, Carol Baumgardt, an enlisted woman under the command of Conaway, made a sworn statement accusing Conaway of engaging in sexual relations with her on two separate occasions, June 6th, 1975, and June 9th, 1975 (R. 972 - 973). There was contrary evidence including two witnesses who saw Conaway at the trailer in question on both occasions and indicated that Conaway made no advances toward Baumgardt. Further, Mrs. Jerry Conaway states that on the occasion of June 6, 1975, she had sent her husband to Baumgardt's trailer to deliver some garden vegetables (R. 935). However, on Monday, July 7, 1975, Conaway was called in to the C.I.D. office (Criminal Investigation Department) and handed a sheet charging him with adultery, unlawful cohabitation and conduct unbecoming an officer. He was photographed and fingerprinted. At this time he decided to seek legal counsel

(R. 938). The record indicates that at all times Conaway has denied the truth of Baumgardt's allegations and at the time this lawsuit was filed his verified affidavit was entered into the Court record denying the charges (R. 16).

The record indicates that Ms. Baumgardt had been promised that no action would be taken against her for her statements (R. 1046d) and had been promised and actually received an early release from the Army (R. 1046d). It had been her desire to receive an early release for some time and thus, the early release was a reward for her statement (R. 975). The record also reflects evidence of Baumgardt's prior intent to blackmail Conaway for the purpose of obtaining favorable work hours (R. 975).

On July 3, 1975, Conaway was relieved as Commander of the 43rd Company by the

Officer Christensen who rewarded Carol Baumgardt for her statement.

On July 25, 1975, Col. Neal R. Christensen issued an adverse officer efficiency report as a result of the alleged incident. Although the report used the term "fraternization," it is clear from the record that the report was based on the accusation of adultery made by Baumgardt (R. 1006).[1] The record also reveals that the Army Board for Correction of Military Records (ABCMR) recognized the incident arose out of Baumgardt's statement and not otherwise (R. 480).

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[1] The agent's investigative notes show the following entry for July 17, 1975, approximately two months before the August 22, 1975 polygraph test was given to Baumgardt:

> [Received] a call from Christensen, who said that Conaway was going to received (sic) a letter of reprimand and a bad OER for this case and the charge as was going to be reflected in the letter would be "fraternization" He said they wouldn't use the charge of adultery.

Besides the use of the term "fraternization," Christensen had also decided Conaway's guilt before the investigation was complete (R. 1006).[2]

The officer efficiency report further accused Conaway of using mess hall food for a private party. Conaway denied this charge in a sworn affidavit filed in the record May 24, 1976 (R. 40).

On August 8, 1975, General William D. Maddox, Jr. issued a letter of reprimand based on the alleged adultery incident. General Maddox did not mention the alleged misuse of mess hall food (R. 19 - 20).

On April 5, 1976, Conaway received notification that he had been selected for release from active duty (R. 7).

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[2] Army Regulation 623-105, 1-5(b) forbids the reference to incomplete investigation, which apparently Colonel Christensen had already decided to use regardless of the outcome of the investigation.

Conaway was released on June 3, 1976, just 59 days after his notification of selection for release.[3]

On the day of his release he was just 26 days short of having served 18 years in the Army.[4]

The plaintiff has never been given adequate opportunity to rebut the charges against him prior to the discharge and no hearing has ever been afforded plaintiff officer with regard to the dual charges of adultery and theft which precipitated his discharge.

By separate affidavits to the lower court he has denied both the charges

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[3] Army Regulation 635-100, 3-58(d) provides that an officer shall not be released prior to ninety (90) days from notification of his release without his consent.

[4] Army regulations prohibit an officer who has served 18 years from being released under the provisions of AR 635-100, 3-58.

involving adultery and those involving theft. He has from the outset denied the truth of both allegations.

Honorable Judge Frank M. Johnson, Jr.'s opinion denying Jerry Conaway's relief reasoned that the action did not involve a valid due process claim under the decision of the Court in Wisconsin v. Constantineau, 400 U.S. 433 (1971), and the decision of the Fifth Circuit Court of Appeals in Sims v. Fox, 505 F.2d 857 (1974). He reasoned that this discharge would not affect Conaway's good name or standing in the community and that further, Conaway had no "vested right" to continue in the employ of the United States Armed Forces (Slip. Op. at 4).

In a second portion of the opinion, Judge Johnson reasoned that even if the discharge was achieved in violation of several Army regulations, the fact that the Army Board for Correction of Military

Records had reviewed the case removed any taint on the illegal discharge (Slip. Op. at 6). In other words, the Army has the power to pass its own illegal discharge through its own "Board for Correction of Military Records" and thus purify the violations and remove the Court's jurisdiction under the Administrative Procedure Act. If true, the Army Board for Correction of Military Records has the power to override an Act of Congress, namely, the Administrative Procedure Act, 5 U.S.C. §§ 702, 703, 704 and 706.

A R G U M E N T

I. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, BY AFFIRMING THE OPINION OF THE DISTRICT COURT, HAS RENDERED A DECISION IN CONFLICT IN SEVERAL REGARDS WITH OTHER COURTS OF APPEAL IN THE UNITED STATES AND ALSO IN CONFLICT WITH THE UNITED STATES COURT OF CLAIMS.

With regard to the applicability of the Fifth Amendment to military

administrative discharge, there are at lease three circuits in conflict as follows: (1) the District of Columbia in Bland v. Connally, 293 F.2d 852 (D.C.Cir. 1961), and Davis v. Stahr, 293 F.2d 860 (D.C.Cir. 1961), holding that servicemen should be afforded due process before suffering derogatory administrative discharges.

The Fourth Circuit has agreed with the Fifth Circuit in denying due process of law to servicemen who are the subject of derogatory administrative discharges. This posture is evident in the cases of Reed v. Frank, 297 F.2d 17 (4th Cir. 1961), and Sims v. Fox, 505 F.2d 857 (5th Cir. 1974).

The various circuits as well as the United States Court of Claims are in conflict with regard to the extent of the power which the law gives to the Army Board for Correction of Military Records.

Specifically, there is conflict on the issue of the burden which the plaintiff carries in reversing the decision of the Army Board for Correction of Military Records in a federal court.

In the instant case the Fifth Circuit, by affirming Judge Johnson's opinion in the District Court, has ruled that the Army Board for Correction of Military Records can condone or purify clear violations of Army regulations and the plaintiff has no recourse but to prove that the decision of the Army Board for Correction of Military Records was arbitrary or capricious.

Apparently, the District of Columbia Circuit is in accord with the Fifth Circuit in holding that to reverse the Army Board for Correction of Military Records, the plaintiff must prove that the actions of the Board were arbitrary and capricious and not just that the discharge sought to

be voided was accomplished in violation of Army regulations. Kenhans v. Callaway, 403 F.Supp. 290, 294 (D.D.C. 1975).

There are legions of cases in various circuits as well as within the Court of Claims of the United States which are in direct conflict with these two cases as follows: Bray v. United States, 515 F.2d 1383 (Ct.Cl. 1969); Dowler v. Schlessinger, 384 F.Supp. 39 (D.N.D. 1974); Esgate v. United States, 186 Ct.Cl. 207, cert. denied 395 U.S. 913 (1968); Jordan v. United States, 205 Ct.Cl. 54 (1974); Friedberg v. Resor, 453 F.2d 935 (2nd Cir. 1971); Ashe v. McNamara, 355 F.2d 277, 281 (1st Cir. 1965); Able v. United States, 191 Ct.Cl. 89, 423 F.2d 339 (1970); Merson v. United States, 185 Ct.Cl. 48, 401 F.2d 184 (1968); Lipp v. United States, 181 Ct.Cl. 355, 301 F.2d 674 (1967); Ward v. United States, 178 Ct.Cl. 210 (1967); Powers v. United States, 176 Ct.Cl. 388 (1966); Walters v.

United States, 175 Ct.Cl. 215, 358 F.2d 957 (1966); Boland v. United States, 169 Ct.Cl. 145 (1965); Hamlin v. United States, 183 Ct.Cl. 137, 141, 391 F.2d 941, 943 (1968); Russell v. United States, 183 Ct. Cl. 802 (1968).

In other words, in these circuits, the decision of the Army Board for Correction of Military Records will be reversed if the discharge which it (Army Board for Correction of Military Records) "refused to change was itself illegal," due to prior regulatory violations.

II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS, BY AFFIRMING THE OPINION OF THE DISTRICT COURT, DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT, BUT SHOULD BE DECIDED.

The Fifth Circuit has in effect decided that civilian standards of due process do not apply to servicemen where the

serviceman has been discharged administratively under circumstances where the discharge is stigmatizing and derogatory. This Court has never defined the due process rights of the serviceman in administrative matters.

In 1953, this Court, in Burns v. Wilson, 346 U.S. 137 (1953), announced that at a minimum the due process clause of the Fifth Amendment protects military personnel from "crude injustices" and lack of "rudimentary fairness" in court martial proceedings. This Court has never pronounced the requirements of due process when a serviceman is punished administratively under allegations of criminal or quasi criminal activity through administrative channels as opposed to the military criminal justice system.

The Fifth Circuit has in this case decided that the serviceman has no "liberty" interest to invoke the due process

clause of the Fifth Amendment where adverse information is placed in his military record. In effect, the Fifth Circuit has stated by this opinion that the discharge of a serviceman under unproven allegations of adultery and theft will not affect his community standing or foreclose employment opportunities so long as the reasons for the discharge are not announced publicly.

This Court should also decide the subsidiary question of whether or not a person's military file is sufficiently public to require elementary due process when a serviceman is discharged under allegations of criminal or quasi criminal activity through administrative channels.

III. THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED THIS CASE IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In the instant case the Fifth Circuit has in effect held that the United States Army can deprive the plaintiff, Jerry D. Conaway, of employment in his chosen profession, label him guilty of criminal or quasi criminal activity and deprive him of the benefit of Army regulations without providing him with basic due process under the Fifth Amendment to the Constitution of the United States.

This conflicts with decisions of this Court in Goldberg v. Kelley, 397 U.S. 254 (1970) and Greene v. McElroy, 360 U.S. 474 (1959).

The Fifth Circuit has decided by this case that the presence of derogatory information in a person's military file and the subsequent punishment based on the same derogatory information does not deprive the plaintiff of "liberty" within the meaning of the Fifth Amendment. This is in conflict with several decisions of this Court

including Board of Regents v. Roth, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L. Ed.2d 548 (1972); Traux v. Raich, 239 U.S. 33, 35 (1915); In re: Griffith, 413 U.S. 717, 720 (1973); Greene v. McElroy, 360 U.S. 474 (1959); United States v. Robel, 389 U.S. 258 (1967); Joint Anti-Fascist Committee v. McGarth, 341 U.S. 123, 183 (1951).

Respectfully submitted,

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APPENDIX

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DEPARTMENT OF THE ARMY
U.S. ARMY MILITARY PERSONNEL CENTER
200 STOVALL STREET
ALEXANDRIA, VIRGINIA 22332

REPLY TO ATTENTION OF: DAPC-OPR-PS

SUBJECT: Release from Active Duty

Captain Jerry D. Conaway, 509-40-3721, FA
U.S. Army Aviation Center
Fort Rucker, Alabama 36360

1. A Department of the Army Active Duty Board has conducted a comprehensive and impartial review of your entire military record under the provisions of paragraph 3-58a, Section XV, AR 635-100. This section provides for the release of officers whose degree of efficiency and manner of performance of duty require relief from active duty or elimination from the service. The Board, after careful deliberation, has selected you for release from active duty. All factors were considered, including your efficiency ratings, comments on your efficiency reports, schooling, commendations, and types and variety of assignments. The Board's determination is final.

2. The Department of the Army is aware of the impact that such unscheduled releases have on an individual. Every assistance will be provided to you in connection with your transition from military to civilian life.

3. Your release from active duty will be accomplished on the 90th day after you receive this notification provided it is not in contravention with AR 600-31. You may request earlier release. Early release will not affect your eligibility for readjustment pay if you are otherwise qualified. Your local commander will provide any assistance

or guidance you may require in this matter.

BY ORDER OF THE SECRETARY OF THE ARMY:

F. ROY SHIRLEY, JR.
Colonel, GS
Chief, Personnel Operations
Division

DEPARTMENT OF THE ARMY
U.S. ARMY MILITARY PERSONNEL CENTER
200 STOVALL STREET
ALEXANDRIA, VIRGINIA 22332

REPLY TO ATTENTION OF: DAPC-PSR-S

SUBJECT: Correction of Military Records

SGT Jerry D. Conaway
304 Meadow Lane
Enterprise, Alabama 36330

1. This is in further reply to your request for correction of your Army records.

2. The Secretary of the Army has established administrative procedures for the guidance of the Army Board for Correction of Military Records. Under these procedures, an applicant must establish sufficient basis for review of his application; otherwise, such application may be denied.

3. Following examination and consideration of your Army records, together with such facts as presented by you, the Board determined on 20 October 1976 that insufficient evidence had been presented to indicate probable material error or injustice. Accordingly, your application was denied.

4. In the absence of new and material evidence tending to show the existence of error or injustice in the military records, further consideration by the Board is not contemplated.

BY ORDER OF THE SECRETARY OF THE ARMY:

MARY RUTH WILLIAMS
Colonel, GS
Deputy for Personnel Records

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

SFMR

Sergeant Jerry D. Conaway
304 Meadow Lane
Enterprise, AL 36330

Dear Sergeant Conaway:

I refer to your application for correction of military records wherein you requested the removal of an officer efficiency report, and letter of reprimand from your records and restoration to active duty as a captain.

The Army Board for Correction of Military Records may deny an application if a sufficient basis for review has not been established.

After examining and considering your Army records and facts you presented, the Army Board for Correction of Military Records determined on 20 October 1976 that insufficient evidence has been presented to indicate probable material error or injustice; accordingly your application was denied.

In the absence of new and material evidence tending to show existence of error or injustice in the military records, further consideration by the Board is not contemplated.

Sincerely yours,

SF: Mr. Robert H. Ford

Raymond J. Williams
Executive Secretary
Board of Correction
of Military Records

SFMR

Sergeant Jerry D. Conaway
304 Meadow Lane
Enterprise, AL 36330

Dear Sergeant Conaway:

Further reference is made to the correspondence of 24 November 1976, on your behalf, concerning the manner in which you were released from active duty.

Information received from the United States Army Military Personnel Center indicates that you were considered for release from active duty by a Board that was appointed on 4 October 1974, rather than 15 April 1975, and that you have been furnished with a copy of the appropriate letter of instructions.

The foregoing notwithstanding, a panel of members of the Army Board for Correction of Military Records reconsidered your case on 19 January 1977. It was their unanimous determination that there was no basis to justify a reversal of the original decision of the Board of 20 October 1976, which must be sustained.

Sincerely yours,

Raymond J. Williams
Executive Secretary
Board for Correction
of Military Records

CF: Mr. Robert H. Ford
1018 S. Burndidge Street
P.O. Box 426
Troy, Alabama 36081

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

CAPTAIN JERRY D. CONAWAY, Plaintiff, vs. CLIFFORD L. ALEXANDER, Secretary of the Army; JAMES C. SMITH, Major General, Commander, Fort Rucker, Alabama; LTC NEAL R. CHRISTENSEN; COL. CARL H. McNAIR; LTC JOHN A. PHILLIPS, JR.; COL. CRAWFORD BUCHANAN; LTC DAN M. JUNATOLO, Defendants.	CIVIL ACTION NO. 76-33-S

JUDGMENT

Upon consideration of the findings of fact and conclusions of law made and entered herein this date and pursuant thereto, it is the ORDER, JUDGMENT and DECREE of this Court that judgment be and is hereby entered in favor of the defendants.

It is further ORDERED that all relief sought herein by plaintiff Conaway be and is hereby denied.

It is further ORDERED that the costs incurred in this proceeding be and are hereby taxed against the plaintiff, Conaway.

Done, this the 1st day of August, 1977.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

CAPTAIN JERRY D. CONAWAY,)
)
Plaintiff,)
)
vs.) CIVIL ACTION NO. 76-33-S
)
CLIFFORD L. ALEXANDER, Secretary)
of the Army; JAMES C. SMITH,)
Major General, Commander, Fort)
Rucker, Alabama; LTC NEAL R.)
CHRISTENSEN; COL. CARL H.)
McNAIR; LTC JOHN A. PHILLIPS,)
JR.; COL. CRAWFORD BUCHANAN;)
LTC DAN M. JANUTOLO,)

Defendants.

MEMORANDUM OPINION

This case arises from the discharge from the United States Army of then Captain Jerry D. Conaway. In 1975, Conaway had under his command Private Carol Baumgardt, an enlisted woman. Conaway brought disciplinary proceedings against Private Baumgardt, whereupon she accused him of prejudice growing out of his personal relations with her. In particular, she alleged that they had had sexual intercourse. An investigation was launched by the Army. Two witnesses confirmed having seen Conaway and Private Baumgardt fraternizing; and Conaway himself admitted visiting her at her trailer -- although he denied having had sexual relations with her. Eventually, Private Baumgardt was given a lie detector test, which she passed. The battalion commander concluded that the punishment that Conaway had sought for Private Baumgardt was unwarranted by the offense that she was alleged to have committed. As a result of investigation, Conaway was relieved of his command.

An Officer Efficiency Report was prepared, which was uncomplimentary to Conaway because of these incidents, and forwarded to him for comment. It was then included in his record, along with his comments. Subsequently a Letter of Reprimand was prepared and forwarded to Conaway. He received it on August 13,

1975. He requested thirty days in which to draft a rebuttal but was only given until August 22. The same request by his military legal counsel was also denied. Upon review by the Army, the Letter of Reprimand also went into Conaway's record. Conaway appealed the Officer Efficiency Report to the Special Review Board. The Letter of Reprimand was appealed to the Suitability Evaluation Board. Both appeals were denied. Thereafter, an Army Active Duty Review Board selected him for release from active duty. Conaway was orally informed of this March 5, 1976. He then went on leave and upon returning refused to acknowledge prior receipt of notice. On June 3, 1976, he was released from active duty. He appealed to the Army Board for Correction of Military Records (ABCMR), which denied the appeal. A request for reconsideration was granted, but the ABCMR ruled against Conaway again.

Conaway brings this action seeking reinstatement,[1/] back pay, and invalidation of one of the Army's regulations against Clifford L. Alexander, Secretary of the Army; James C. Smith, Major General, Commander, Fort Rucker, Alabama; LTC Neal R. Christensen; Col. Carl H. McNair; LTC John A. Phillips, Jr.; Col. Crawford Buchanan; and LTC Dan M. Janutolo. He asks in his brief that his file be corrected, but there is no such prayer in his complaint, and consequently this matter will not be addressed. His contentions may generally be divided into three areas. First, he contends that the Active Duty Board which released him from the service did so in an unauthorized manner. Second, he alleges numerous violations of regulations in his release and in the manner in which the reprimand and efficiency report were included in his file. Third, he attacks the Army regulation which permitted his discharge without a hearing. The case is now submitted upon cross motions for summary judgment. As authorized by Rule 52(a), Federal Rules of Civil Procedure, the appropriate findings of fact and conclusions of law are incorporated in this memorandum opinion.

The initial question for consideration is that of jurisdiction. The Secretary maintains that the principle of sovereign immunity prevents the Court from reviewing this case. This is without merit. Harmon v. Brucker, 355 U.S. 579 (1958), upheld the power of a district court to review a military discharge which is alleged to be contrary to a statute. It has also been held that a district court may review an alleged violation of the military's own regulations. Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); See

1/ He seeks reinstatement as a captain. He has re-enlisted and is currently serving as a sergeant.

Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). It is true that litigation must not be permitted to "stop government in its tracks," Ogletree v. McNamara, 449 F.2d 93, 100 (6th Cir. 1971), but reinstating one officer certainly would not do that. See Harmon v. Brucker, supra.

There are limits on the power of federal courts to review the internal affairs of the military other than sovereign immunity. In Mindes v. Seaman, supra, the Fifth Circuit said that some military matters are nonreviewable. First, the Court should consider the "nature and strength of the plaintiff's challenge to the military determination." Constitutional claims generally rank higher than statutory or regulatory ones, and claims with the same legal base may be of differing values.[2/] With regard to the strength of the claim, "[a]n obviously tenuous claim of any sort must be weighted in favor of declining review." Id. at 201. Second, the Court should consider the potential injury to the plaintiff. Third, the "type and degree of anticipated interference with the military function" must be considered. And fourth, the Court should take into account the "extent to which the exercise of military expertise or discretion is involved." Because the "strength" of the claim is a consideration, the determination of reviewability, as articulated in the Mindes decision, is apparently intertwined with the merits. Consequently, the merits will be addressed initially.

Conaway's first major contention is that the Army Active Duty Review Board which released him did so in an unauthorized manner. The Army insists that Conaway was released under the provisions of Paragraph 3-58a of Army regulation 635-100. This provides for the qualitative release of officers. Conaway contends that the Letter of Instruction to the Board only permitted releases under Paragraph 3-58b, providing for quantitative releases. Further, he contends that the letter only authorized the consideration of reserve officers in the year groups 1967 through 1970. Captain Conaway was in the 1966 group. However, Conaway's position is based on information provided him by the Army under the Freedom of Information Act. The Army now states that Conaway was provided with the wrong Letter of Instruction. The Board which considered Conaway's release was actually appointed by a Letter of Instruction which authorized it to act under all the provisions of paragraph 3-58. And it was to consider, among other matters, the release of "other than Regular Army officers," not limited to any year groups. Thus it was entitled to consider Conaway for

2/ As an example, the Fifth Circuit pointed out that a constitutional challenge to a court-martial was of more weight under this analysis than a challenge to a haircut regulation. See Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

release. Conaway produces no evidence that the Army's explanation, including the sending of the wrong Letter of Instruction to Conaway, is untrue. Consequently, the claims regarding the Letter of Instruction are without merit.

A second major claim by Conaway is that the Army violated the Due Process Clause of the Fifth Amendment by releasing him from the service without a full hearing.[3/] In order to assert a contention of deprivation of property in violation of due process, an entitlement to the property must be shown. Board of Regents v. Roth, 408 U.S. 564 (1972). A personal expectation is insufficient. Id. Conaway has made no showing of entitlement to his position in the Army. In fact, 10 U.S.C. § 681(a) provides that "the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty."[4/] A discharge involving an attack on the person's good name may be a deprivation of a liberty interest. Wisconsin v. Constantineau, 400 U.S. 433 (1971). But there has been no showing that any action by the Army will harm Conaway's good name, as the Army did not publish the reasons for the release, and did not plan to do so. All publicity with regard to this matter has come about through Conaway's efforts. The Fifth Circuit, sitting en banc, decided that the discharge of a reserve officer on active duty in the Air Force did not involve a due process interest. Sims v. Fox, 505 F.2d 857 (1974). It said that "one has no vested right to continue in the employ of the United States Armed Forces." Id. at 861. No reason was shown on the discharge in the Sims case, so the serviceman's interest in his good name was not affected. Id. Thus he was not permitted to assert a due process claim to a hearing before discharge. The Sims case seems controlling here.

Conaway's other major claim is that a number of regulations were violated during the course of events involved in this case. The principal one involving his release is that he was discharged too early. Under AR 635-100, 3-58d, an officer may not be discharged until the ninetieth day after he receives notice. Conaway was released June 3, 1976. He acknowledged written notice on April 5, 1976, and contends that this was the only notice that he received that satisfied the requirement of the regulation. However, the Army avers that Colonel

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3/ Plaintiff attacks the constitutionality of AR 635-100, Section V, 5-14 (a) (3), for failing to make such a provision. In the latest Army regulations, as provided to the Court, there is no 5-14 (a) (3). Presumably Conaway has reference to 5-14 (c) (3).

4/ There are exceptions to this, but none are applicable here, and plaintiff makes no such allegation.

Courtney orally notified Conaway on March 5, 1976, ninety days before his discharge. Conaway admits in his complaint that he was orally notified by Colonel Courtney, and does not dispute that this event occurred on March 5. The regulation does not say that notice must be in writing, and Conaway makes no showing that the Army's interpretation of its own regulation is incorrect. And the Army should be the "primary authority for the interpretation of its own regulations." Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974).

Conaway's other contentions about regulatory violations involve the procedure which was followed by the Army prior to consideration of his case by the Board for Correction of Military Records. Conaway maintains that reference is made in his record to an incomplete investigation.[5/] He states that he was not sent an addendum containing the findings of the investigation.[6/] He further maintains that there is no notation on the Letter of Reprimand that AR 600-37 was complied with.[7/] And he says that the requirement of fair and just standards contained in AR 600-37 (1-3) was violated. He contends that he was not given an adequate opportunity for rebuttal to the Letter of Reprimand, and that two forms are not in his file that should be.[8/] Finally, he says that he was not notified that he had been recommended for elimination so that he could file rebuttal.[9/] These alleged regulatory violations are advanced in support of the claim that he is entitled to reinstatement. Because of the conclusion reached below, it will be unnecessary to consider the accuracy of either Conaway's factual allegations or of his interpretation of the regulations.

5/ He says that the adverse Officer Efficiency Report and the Letter of Reprimand "were conceived and implemented before any investigation was completed." He asserts that this violates 1-5b of AR 623-105.

6/ Conaway contends that this failure violated AR 623-105 (1-5b).

7/ Conaway says that this failure violated AR 600-37 (2-3h).

8/ There is no form signed by him stating that he has read and understands the charges and either does or doesn't submit a statement. According to Conaway, this is contrary to AR 600-37 (2-6). He also says that form 635-100 (3-3) was not placed in his file as AR 635-100 (3-58d2) requires, prior to inclusion of derogatory remarks.

9/ This is alleged to violate AR 635-100, Section V, 5-14.

Plaintiff's basic attack is upon the fairness of the process by which it was determined that he would be discharged. In particular he cites regulatory violations in the way that the record was compiled. However, he points to no violations in the manner in which the Army Board for Correction of Military Records conducted its review. The Board had the power to correct a violation of Army regulations, Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974), and considered itself as sitting to correct "probable material error or injustice."10/ It considered the propriety of the adverse Officer Efficiency Report and of the Letter of Reprimand, and of Conaway's release. It found that they were justified.11/ Had the Board concluded that there was injustice, it could have prevented the discharge and corrected Conaway's records. See Hodges v. Callaway, supra. Thus, even assuming that the Army procedure failed to strictly follow the regulations in earlier stages, the existence of a fair procedure, consistent with the regulations, before the Board for Correction of Military Records, removed any taint on the discharge. A discharge ordered under a procedure contrary to the regulations might be set aside. But where a determination has been made, consistent with the regulations, that a discharge is proper, then the discharge should not be subject to attack because there have been similar findings made under procedures which weren't consistent with the regulations.

Conaway also contends that he was judged by an unfair standard, and, therefore, the Army acted unreasonably in discharging him. In Knehans v. Callaway, 403 F. Supp. 290 (D.D.C. 1975), it was held that it is necessary to find that the Army Board for Correction of Military Records acted unreasonably in not overturning an honorable discharge before the court may interfere. It stated that "in order to grant plaintiff's requested relief, it is not enough to find that the Selection Boards violated Army regulations; the plaintiff must further show that the ABCMR acted arbitrarily and capriciously in failing to correct the error . . ." Id. at 294. The records presented here clearly reflect there was sufficient evidence before the ABCMR from which it could have concluded that Conaway had shown a serious lack of judgment which justified his discharge. It was, therefore, reasonable for it not to overturn the discharge, even assuming that some regulations had been violated in the earlier consideration of the matter.

10/ See page 144 of the Appendix.

11/ See Appendix 125, 144.

The second consideration is the potential injury to the plaintiff if review is refused. Conaway has re-enlisted and is now a sergeant. The difference between this position and that of captain is considerable, and Conaway, therefore, has a strong interest in review in this case. The third consideration is anticipated interference with the military function. There will be some interference, but this is always the case when review is granted. Mindes v. Seaman, supra. The final consideration is the extent to which the exercise of military discretion is involved. This is not a major factor here. Conaway's claims are probably strong enough, when combined with the potential injury to him if review is refused, to support review in this case. However, if the merits were reached, the Army would still be entitled to prevail.

A judgment will be entered in favor of defendants and against the plaintiff.

Done, this 1st day of August, 1977.

UNITED STATES DISTRICT JUDGE

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-3100

CAPTAIN JERRY D. CONAWAY,

Plaintiff/Appellant,

versus

CLIFFORD L. ALEXANDER, Secretary of the Army, ET AL.,

Defendants/Appellees.

Appeal from the United States District Court for the
Middle District of Alabama

(OCTOBER 23, 1978)

Before JONES, AINSWORTH and HILL, Circuit Judges

PER CURIAM:

Affirmed on the basis of the opinion of the District Judge Frank M. Johnson, Jr., dated August 1, 1977.

AFFIRMED.